Editor's note: 87 I.D. 14

KIN-ARK CORP.

IBLA 79-406 Decided January 23, 1980

Appeal from the decision of the New Mexico State Office of the Bureau of Land Management rejecting preference right coal lease application NM 11916.

Vacated and remanded.

1. Administrative Procedure: Adjudication -- Application and Entries: Valid Existing Rights -- Coal Leases and Permits: Generally -- Regulations: Applicability

   Where the holder of a coal prospecting permit completes his exploration and applies for a preference right coal lease in 1973, the application must be adjudicated on the basis of the applicant's subsequent conformity with regulations amended in 1976 with retroactive effect. However, where the application is summarily rejected solely for the reason that the applicant's supplemental submission is "inadequate," without identifying the deficiency, the decision will be vacated and the case remanded for readjudication.

APPEARANCES: William F. Carr, Esq., Santa Fe, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

On December 1, 1970, the New Mexico State Office of the Bureau of Land Management (BLM), issued to Hoover H. Wright a 2-year coal prospecting permit for 2,880 acres in T. 24 N., R. 13 W., New Mexico principal meridian. After a 1-year extension Wright apparently had not completed his exploration program when he assigned the permit to Kin-Ark Corporation. This assignment was approved by BLM on January 15, 1973.

Kin-Ark, apparently hampered by a shortage of time remaining in the permit and unavailability of drilling equipment, nevertheless managed to complete the exploration and submit its application for a preference right coal lease on November 29, 1973 -- one day prior to the expiration of the permit.

The imposition of a Secretarial moratorium on the issuance of coal leases and permits caused BLM to suspend action on the adjudication of Kin-Ark's lease application. See Krueger v. Morton, 539 F.2d 235 (D.C. Cir. 1976); Hunter v. Morton, 529 F.2d 645 (10th Cir. 1976). While the application was pending, Congress enacted the Federal Coal Leasing Amendments Act of 1975 (FCLAA), 90 Stat. 1083; 30 U.S.C. § 201(b) (1976). Meanwhile, the Department revised its regulations relating to coal leasing -- 43 CFR Part 3520 -- on May 7, 1976. One of the revised regulations, 43 CFR 3521.1-1(b), required applicants for preference right coal leases to support their applications by the submission of significantly more material and information than

was required theretofore under the regulation in effect at the time Kin-Ark's application was filed, i.e., 43 CFR 3521.1-1(b) (1973).

By its decision dated June 29, 1976, BLM called upon Kin-Ark to support its application with the additional "data and information" required by the revised regulation. Kin-Ark requested and was granted two extensions of time to make this submission. Certain information was then filed by Kin-Ark, although the record before us does not reveal exactly what it was, as it was transmitted to Geological Survey by BLM, and apparently retained there. However, a copy of BLM's transmittal memo, dated September 6, 1977, states:

> Enclosed is the information submitted by Kin-Arc [sic] Corporation in support of their coal preference right lease application NM 11916.
>
> The information has been submitted in response to our June 29, 1976 Decision and as required by the attached Notice and regulations contained in Circular 2390. [1/]

By decision of that same date (Sept. 6, 1977) BLM required Kin-Ark to submit, at its expense, "a certified abstract from a qualified abstractor, as to the presence of any mining claims (located prior to the date of issuance of the permit), embracing all or part of the public land area under the * * * permit," as required by Instruction Memorandum No. 77-410 dated August 18, 1977, from the Acting Director, BLM. The record does not show that Kin-Ark submitted an abstract.

1/ The circular referred to contains the revised regulations excerpted from Title 43, Code of Federal Regulations.

On February 5, 1979, the Area Mining Supervisor, Geological Survey, wrote a memorandum to BLM's Chief of Lands and Minerals Operations, Santa Fe, which memo dealt with the status of the subject application in one terse, conclusory sentence, viz: "We have received the additional data for NM 11916 from you, but the data is still inadequate under the requirements for the initial showing published in 1976 for all preference right lease applications for coal."

Without inquiring as to how or why Survey considered that "the data is still inadequate" BLM issued a decision on May 3, 1979, rejecting Kin-Ark's preference right lease application, giving as its sole reason for so doing that the data furnished by Kin-Ark in response to BLM's decision of June 29, 1976, "[H]as been examined and found to be inadequate" to meet the requirements of the 1976 amendment of 43 CFR 3521.1-1(b). Kin-Ark has appealed.

[1] We begin with the observation that notwithstanding any other aspect of the case, the rejection of the application solely for the reason that someone has said that it is "inadequate," without any specification of the nature of the deficiency or any consideration of whether the deficiency was fatal or remediable, major or insignificant, requires us to strike the decision down. There was no stated basis for the action; it left the appellant in ignorance of the reason for the rejection and unable to respond, and it provided this Board with nothing to adjudicate on appeal. Indeed, the initial decision cannot be characterized as the product of "adjudication," as it

appears that its author had no more comprehension of what was supposedly wrong with the application than has been communicated to the rest of us. Such a decision must be treated as arbitrary and capricious. See Charles E. Hinkle, 40 IBLA 250 (1979); Steven and Mary J. Lutz, 39 IBLA 386 (1979). An appeal by one adversely affected by a decision is subject to dismissal if the appellant "fails to point out how the decision appealed from is in error" and how he "has improperly been deprived of some right." Duncan Miller, 41 IBLA 129 (1979). Therefore, unless the decision states a specific reason for the action taken, an appellant is usually left helpless to make an appeal on the merits of his application.

However, in this case appellant has chosen to ground its appeal on its assertion that it cannot be required to meet the requirements of the 1976 revised regulations, as it had already established its right to receive a lease as a matter of law by its alleged demonstration of a discovery of commercial coal in accordance with the requirements of the regulations in 1973.

As noted above, appellant had completed its approved program of exploration, asserted a discovery of commercial coal, and filed its application for a preference right coal lease on November 29, 1973, prior to the expiration of the term of its prospecting permit. All of this was allegedly done in compliance with the requirements of the statute and regulations then in effect.

The statute, 30 U.S.C. § 201(b) (1970), provided:

> Where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area, the Secretary of the Interior may issue, to applicants qualified under this chapter, prospecting permits for a term of two years, for not exceeding five thousand one hundred and twenty acres; and if within said periods of two years thereafter the permittee shows to the Secretary that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this chapter for all or part of the land in his permit. [Emphasis added.]

This language invested the Secretary with the authority to grant or refuse a prospecting permit at discretion, "may issue" being the operative verb phrase. However, once the permit was issued, the Secretarial discretion afforded by the statute was fully and finally exercised. Thereafter, the right of the permittee to receive a lease was controlled by his success in demonstrating to the Secretary that the land contained coal in commercial quantities. If he did so, the statue declared, "[T]he permittee shall be entitled to a lease * * *." The Department has long taken the position that, notwithstanding its use of the term "preference right lease," the Secretary has no discretionary power under the statute to refuse to grant the lease, and the applicant who meets all the statutory and regulatory requirements becomes entitled to a lease of the discovered deposit as a matter of law. J & P Corporation, 13 IBLA 83 (1973); Peter I. Wold, II, 13 IBLA 63, 80 I.D. 623 (1973); Emil Usibelli, 60 I.D. 515 (1951); Leonard E. Hinkley, A-26187 (June 12, 1951). In fact, it appears that in years past the Department's recognition of the absolute right of a successful prospecting permittee to the coal which he had discovered was even

more clearly viewed than recently. In Emil Usibelli, supra, the Solicitor of this Department held:

> Where the holder of a coal prospecting permit, as the result of prospecting work done on the land covered by the permit, has demonstrated that the land contains coal in commercial quantities and has submitted an application for established policy of the Department permits the applicant to begin the commercial mining of coal from the land without awaiting the actual issuance of a lease to him. [60 I.D. 516.]

While it can no longer be said that this represents Departmental policy, due to environmental and other considerations, the rule of law emphasized by Usibelli and the other decisions cited remains unaltered. N.R.D.C. v. Berklund, 458 F. Supp. 925 (D.D.C. 1978), aff'd, Fairfax and Andrews, Debate Within and Debate Without, 19 Natural Resources Journal 505, 519-22 (1979).

The question remaining, then, is whether a permittee who has completed his exploration, allegedly discovered commercial coal, timely filed his application for a lease, and supported that application with the showings required by regulation in 1973, can have that application rejected for failure to meet the more onerous requirements imposed by the 1976 revision of that regulation. We answer in the affirmative.

Kin-Ark argues that as it was entitled to a lease as a matter of legal right in 1973, it should not be divested of that right by the promulgation of a subsequent regulation which is applied by BLM with retroactive effect. Indeed, appellant argues with considerable force

that because the Congress empowered the Secretary to adopt general regulations to implement the leasing provisions of the basic Act (30 U.S.C. § 201(a) (1970)), the newly promulgated regulations are legislative in character. It is maintained that the general rule concerning the retroactive application of administrative regulations includes the power to give them retroactive effect, provided they do not conflict with restrictions on legislative power relating to retroactive laws, such as, for instance, the disturbance of vested rights, citing 2 Am. Jur. 2d, Administrative Law § 308 (1962).

"An administrative regulation, especially one which has the effect of creating an obligation, cannot be construed to operate retroactively unless the intention to that effect unequivocally appears." Miller v. United States, 294 U.S. 435, 439 (1935), reh. denied, 294 U.S. 734 (1935). As they now appear in the Code of Federal Regulations there is no "unequivocal" manifestation of any intent to make the revision of 43 CFR Groups 3400 and 3500 regulations retroactive, but when published as proposed rulemaking and again upon final rulemaking, such an intention was clearly stated. On January 19, 1976, when the revision of the subject regulations was published in the Federal Register as proposed rulemaking, the Department stated at 41 FR 2648 (Jan. 19, 1976): "If adopted, the Department will apply the proposed regulations to all pending and future applications for leases by prospecting permittees, but will not reexamine leases that were issued prior to the effective date of these regulations."

On May 7, 1976, when the revision of 43 CFR 3521.1-1 was published as final rulemaking, the regulation was preceded by a description of comments received following the publication of the proposed revision, and the Department's reaction or response to each. The general tenor of this discussion indicates in several places that it was contemplated that the revised regulations would apply to preference right lease applications which were then pending, but, in addition, this issue was addressed directly and specifically at 41 FR 18845 (May 7, 1976), viz:

> 3. Request that this standard not apply to permits granted before the effective date of the regulation. 3520.1-1(d). This section stated that the regulations would apply to applications for leases pending on the effective date of this regulation. The Department has full legal authority to adjudicate pending applications for leases under the standards adopted by these regulations. As a question of policy, it has determined that the public interest would not be fully protected unless these applications for leases are examined under what the Department believes is the correct interpretation of the statute.

Thus, there can be no gainsaying that appellant had clear constructive notice that the revised regulation(s) would be applied to its then pending lease application.

Appellant also argues that since it had established its legal entitlement to receive a lease pursuant to the regulatory criteria existing in 1973, that right cannot be defeated by the more demanding criteria of the 1976 revised regulation, because the Federal Coal Leasing Amendments Act of 1975, supra, specifically provides that its

amendment of section 2(b) of the Mineral Lands Leasing Act (30 U.S.C. § 201(b) (1976)) is "subject to valid existing rights." Therefore, says appellant, the revision of 43 CFR 3521.1, having been promulgated to implement the Federal Coal Leasing Amendments Act, cannot do what the Act expressly prohibits, i.e., adversely affect its pre-existing entitlement to a lease. However, this argument suffers a fallacious premise. The 1976 revision of the coal leasing regulations was not done to implement The Coal Leasing Amendments Act but, rather, these revisions were promulgated pursuant to the authority of "the Mineral Leasing Act of 1920; as amended and supplemented 30 U.S.C. 181-287," (sic) "under section 402, Reorganization Plan No. 3, 60 Stat. 1009," and the "National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. 4321-35." See 41 FR 2648 (Jan. 19, 1976). In fact, the "Federal Coal Lease Amendment Act of 1975" was not enacted into law until August 4, 1976, some 3 months after the promulgation of the revised regulations as final rulemaking. 2/

The saving clause in the Federal Coal Leasing Amendments Act which preserves "valid existing rights" undoubtedly encompasses appellant's then pending application for a preference right lease, so that nothing in that Act could affect appellant's right to receive a lease. But nothing in that Act, or in any regulation promulgated to

2/ Subsequently, the Congress, in recognition of the date of the Act, formally changed its title to the "Federal Coal Leasing Amendments Act of 1976." Section 8, P.L. 95-554, 92 Stat. 2075 (1978).

implement that Act, has adversely affected appellant's right to receive its lease. As the Act eliminated the prospecting permit/preference right mechanism for acquiring a coal lease, the clause exempting those with "valid existing rights" merely made it possible for pending applicants to receive preference right leases thereafter if they showed themselves to be qualified. The Department, in revising 43 CFR 3521.1, was engaged in defining the showing that would be necessary to demonstrate such qualification. Since under the then pending legislative amendment there would be no new preference right lease applicants, the revision could only apply to those who fell within the definition of the "valid existing rights" provision recited in the Federal Coal Lease Amendments bill. Thus, the revision of the regulation was accomplished in full anticipation that "valid existing rights" would be preserved by the Act, rather than in disregard of that provision in the bill then pending. 3/

The amended regulations were intended, inter alia, to properly define the statutory reference to "commercial quantities," and to meet

3/ The Department was justified in this anticipation by the Senate Committee Report published July 23, 1975, which included the following:

"Section 102 also adds a new subsection 2(c) to the 1920 Act which gives express authority for coal exploration permits.

"The Committee wishes to stress that the repeal of a Subsection 2(b) is expressly 'subject to valid existing rights' and thus is not intended to affect any valid prospecting permit outstanding at the time of enactment of the amendments. Any applications for preference right leases based on such permits could be adjudicated on their merits and preference right leases issued if the requirements of Subsection 2(b) of the 1920 Act and other applicable law, such as the National Environmental Policy Act of 1969, were met." (Emphasis added.) S. Rep. No. 94-296, 94th Cong., 1st Sess. 7 (1975).

the enhanced responsibility of the Department with regard to environmental concerns. The propriety of and necessity for such action was articulated in Utah International Inc. v. Andrus, Civ. No. C77-0225 (D. Utah CD June 15, 1979). See Global Exploration & Development Corp. v. Andrus, Civ. No. 78-0642 (D.D.C. Aug. 14, 1978).

We conclude that appellant is obliged to make the submissions required by the amended regulations in order to "show to the Secretary" that its alleged discovery of coal in such as will qualify it to receive a lease with terms and conditions appropriate to other public interest considerations.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case remanded for readjudication.

Edward W. Stuebing
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Douglas E. Henriques
Administrative Judge